# SUPREME COURT

OF THE

## UNITED STATES.

SANFORD BAKER,
Appellee,
vs.
GEORGE P. HUMPHREY ET AL.
Appellant.

No. 267

## MOTION TO DISMISS APPEAL.

---

## BRIEF

OF THEODORE ROMEYN,
Solicitor for Appellee.

---

DETROIT:
FREE AND TRIBUNE JOB PRINTING CO., PRINTERS, BINDERS, ETC.
1881.

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

## Motion to Dismiss Appeal.

SANFORD BAKER,
Appellee,
*vs.*
GEORGE P. HUMPHREY,
HIRAM D. HURD,
CHARLES A. HURD, AND
DAVID SMITH,
Appellants.

No. 267.

And now comes the appellee, Sanford Baker, by Theodore Romeyn, his solicitor, and moves to dismiss the appeal taken by the defendant, George P. Humphrey, from an order entered in this cause, dated August 3, 1880, by the Circuit Court of the United States for the Eastern District of Michigan, in equity, declaring and adjudging the said George P. Humphrey in contempt for not executing the deed ordered by the mandate of this court, and the order of said Circuit Court of the United States for the Eastern District of Michigan, in equity; because

1. The said order was made and is in pursuance of, and in accordance with the mandate of this court, issued in this cause.

2. That said appeal from said order was and is frivolous and without merits.

3. That said appeal tends to delay and defeat the mandate and final decree of this court.

4. That no appeal from said order could or should be entertained by this court.

THEODORE ROMEYN,
Solicitor for Complainant.

## BRIEF ON MOTION.

No. 267.

| | |
|---|---|
| SANFORD BAKER,<br>*vs.*<br>GEORGE P. HUMPHREY, HIRAM D. HURD, CHARLES A. HURD AND DAVID SMITH. | IN THE SUPREME COURT OF THE UNITED STATES. |

Brief of appellee, Sanford Baker, on his motion to dismiss the appeal taken in this cause by George P. Humphrey, defendant, from the order of August 3, 1880, made by the Circuit Court of the United States for the Eastern District of Michigan, in equity, declaring him in contempt for not executing and delivering a deed in pursuance of the mandate of this Court and the decree of said Circuit Court.

### STATEMENT OF CASE.

This cause was originally brought to this Court by the appeal of the complainant, from the decree of said Circuit Court dismissing the bill filed therein, and which decree was reversed by this Court, and the defendant ordered to execute a deed to the complainant, of the premises described in the bill; the mandate of this Court was filed with the Court below, and the following proceedings had thereon, as appears by the record of this appeal and of which a printed copy is produced and presented, to which reference for this purpose is made.

June 2, 1880. Mandate filed, page 1.

June 7, 1880. Affidavit filed of filing a bill by Humphrey in the nature of review or supplement; a copy of this bill appears at pages 18, &c.

June 2, 1880. Notice of filing mandate and service of notice that on the 7th of June, application will be made for a decree and settlement of form of deed, and service of copies of decree and deed proposed, page 3.

June 7, 1880. Decree ordered, and form of deed as proposed settled, p. 4, 5, 7.

July 14, 1880. Proof of service on the 12th of June, on George P. Humphrey, of copy of decree, as granted (p. 12) and of form of deed, as settled, (p. 9) and affidavits (p. 9, 10) of failure to execute deed.

July 14, 1880. Order that Geo. P. Humphrey show cause, on July 26, why attachment should not issue and he be declared in contempt for not executing deed, and proof of service July 17, 1880, (p. 13).

July 26, 1880. Answer to order by Humphrey filed, (p.14).

Aug. 3, 1880. Order entered declaring Humphrey in default and in contempt, and that he be committed, (p. 15).

Aug. 4, 1880. Claim of appeal from this order. Bond for appeal, &c. (p. 16, 17).

Copy of bill filed by Humphrey against Baker, (p. 18, &c.)

June 25, 1880. Demurrer of Baker to bill of Humphrey, (p. 22.)

Aug. 3, 1880. Decree dismissing this bill, (p. 23).

Opinion of Court delivered on dismissing this bill, not filed but produced, signed by Judge Brown, and printed with this argument.

It will thus be seen that the mandate of the Court was filed, notice served thereof and that a decree, as proposed, was served with the form of a deed to be executed. The decree was entered and a deed was ordered to be executed as settled. A copy of the decree and of the form of deed, as settled, were duly served on Humphrey, proof filed of his refusal to execute the deed, and proof of service of copy of order to show cause, and an order made declaring him in contempt, from which the appeal is taken.

A copy of the bill of Humphrey against Baker, the demurrer thereto, and the decree of the Court dismissing it, are also printed with this record that this Court may, if necessary, read the same in connection with the appeal of Humphrey in this case. The record on appeal in the case of Humphrey vs. Baker is filed in this Court.

1. The order was made and is in pursuance of and in accordance with the mandate of this Court in this cause.

The effect of this appeal is the same as to allow an appeal from a decree of the lower Court entered in accordance with the mandate of this Court, and as an appeal from a decree of this Court.

2. That said appeal from said order was and is frivolous and without merits.

3. That said appeal tends to delay and defeat the mandate and final decree of this Court.

4. That no appeal from said order could or should be entertained by this Court.

These three points contained in the motion may be considered together.

The taking of an appeal from a decree or order entered in accordance with the mandate of this Court appears strange and incongruous, as it would open the entire merits of the case, which has been solemnly considered and decided; and that an appeal can or should be entertained from an order, as in this case, to *carry out* and *execute;* this decree of this Court is equally subject to the same criticism, being in effect the same as a direct appeal from the decree and decision of this Court.

It follows from this practice that there is no end to appeals from the decrees and carrying into execution the decrees of this Court.

This appeal is not taken for the entering of a final decree *not* in accordance with the mandate of this Court; as the claim of the appeal distinctly states, it is from the order adjudging him guilty of contempt in not executing the deed (p. 16); and the allowance of appeal states (p. 16) that such appeal is from that order. This appeal leaves the decree entered out of the case, and is therefore confined to the regularity of the proceedings (after the decree) declaring the contempt. As to these proceedings, the answer showing cause (p. 14) does not contain any objection, but excuses the failure of Humphrey on grounds outside of the record and proceedings, which will be considered hereafter.

It will appear from the above proceedings had that Humphrey was (p. 12) personally served with a copy of the decree fixing twenty days after service of a copy for him to execute the deed, and was served with the form of the deed (p. 9) to execute as settled; and on proof of his refusal (p. 9, 10) to execute the same, the order to show cause (p. 13) was granted and served (p. 13), thereupon the *Court* granted the order of committal (15), and that a writ issued in accordance with Equity Rule, No. 8.

The proceedings were regular notwithstanding the waiver by his answer (p. 14), and the Court in its decision of the case

of Humphrey against Baker, held the matters set forth in this answer constituted no answer or excuse for his default.

The complainant, now appellee, in this appeal presents with his printed record a copy of the bill filed by leave of the Court, by Humphrey, against him, and the proceedings had thereon dismissing this bill from which an appeal in this Court was taken. The motion to dismiss is not in this case, and the complainant contends that this bill and case has nothing to do with this motion, but if this Court shall find that it is a bill of review, or in the nature of one, it must be considered as filed without any show of merit, and out of time, and as bad in practice. Humphrey contends that the filing of this bill (which was dismissed for want of merits) prevented a decree on the mandate being entered in the case of Baker vs. Humphrey, until a final hearing was had on his bill. There was no stay of proceedings asked, and as the bill was without merits, no attention was paid to it, except that the application for the order of contempt and committal was postponed and heard with the demurrer to this bill dismissing it.

The complainant does not deny the right of Humphrey to take an appeal, as he has from the decree dismissing his bill, and of having a hearing in due course of time in this Court; but the complainant does insist that he should not be delayed in his rights under the decree of this Court until the case of Humphrey is heard, and then probably dismissed, as it was in the Court below.

Theodore Romeyn
H. H. Wells
for appellee

GEORGE P. HUMPHREY )
*vs.*
SANFORD BAKER. )

## ORAL OPINION OF JUDGE BROWN.

Delivered August 3, 1880.

DISMISSING BILL ON DEMURRER AND ORDER OF COMMITTAL FOR CONTEMPT.

This is a bill in equity to obtain a perpetual stay of proceedings upon a decree lately rendered in this Court in compliance with a mandate of the Supreme Court of the United States, in the case of Baker vs. Humphrey, and in case such stay be not granted, it is asked that the defendant Baker be decreed to pay to the complainant the value of all the improvments purchased and made by Humphrey upon the premises in question, together with all taxes and other sums expended by him on account thereof, and that the cause, in which the decision of the Supreme Court was rendered, may be reheard upon the testimony and pleadings therein, and the facts which have arisen since the appeal of said cause to the Supreme Court, and for such further relief as shall be agreeable to equity.

A general demurrer was filed to this bill. The original bill was filed by Baker against Humphrey, to have a certain deed procured by Humphrey from one Chapman for the sum of twenty-five dollars declared to have been procured for the benefit of Baker, of whom Humphrey was the attorney. The case was heard before the late Judge Emmons and the bill dismissed. Upon appeal to the Supreme Court of the United States, this decree was reversed and an order entered that defendant Humphrey, upon the payment of twenty-five dollars into Court for his benefit, should execute to Baker a deed of the property in question, with a covenant against his own acts. This deed Humphrey has refused to execute, and a motion is made in that case for an attachment against him for contempt of Court in refusing to execute and acknowledge the deed. It is claimed by Humphrey that the pendency of the bill brought

by him, and to which Baker has demurred, has been and is a sufficient excuse for his refusing to execute a deed until that case is finally disposed of. The motion for an attachment and the demurrer to the bill of Humphrey were argued and submitted together.

The chief allegation of the bill is that subsequent to the decree dismissing Baker's bill, and while the case was pending in the Supreme Court of the United States upon appeal, Humphrey obtained a judgment in an action of ejectment against Hurds and Smith, which action Mr. Baker assumed to defend and did employ counsel and did in fact defend, and it is claimed that this judgment creates an estoppel against the decree in the Supreme Court adjudging Humphrey's title to be fraudulent, and that no advantage could have been taken of it before the Supreme Court of the United States upon appeal of the original case, and that the only remedy left Humphrey was to file this bill, which, although an original bill in form, is somewhat in the nature of a cross bill, and that it is the duty of the Court to enjoin the execution of its own decree in the former case by reason of this judgment in ejectment.

The first question then to be considered is, whether the judgment in the suit brought in the State Court by Humphrey against Hurds and Smith is *res adjudicata* of the questions involved in the bill brought by Baker against Humphrey. Section 6,207 of the Compiled Laws provides that actions of ejectment shall be brought against the actual occupant, or if the premises are not occupied, "against some person exercising acts of ownership on the premises claimed or claiming title thereto, or some interest therein at the commencement of the suit; and all persons claiming any title to the premises adverse to that claimed by the plaintiff may in all cases be made defendants in such action." Section 6,237 provides that "every judgment in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title established in such action upon the party against whom the same is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter contained."

Now, it is entirely clear that Baker was not a defendant in that action, nor did he claim from, through or under a defendant by any title accruing after the commencement of such

action; and the question is whether the mere fact that he retained an attorney and assumed the defense of the suit creates as against him an estoppel.

I think this question is practically disposed of by the decision of the Supreme Court of the State of New York in the case of Ryerss vs. Rippey, 25 Wendell, 432, in which the precise question appears to have been passed upon, and it was held that a judgment in ejectment against tenants is not conclusive upon the landlord, although the latter may have retained an attorney to defend a suit brought against his tenants, especially as, on the trial, the title as between the plaintiff in the suit and the landlord did not come in question. The Court held that it was plain that the statute of that State, which is identically the same with ours, applies only to the party or parties to the record and privies. The same ruling was made in the case of Anslie vs. Mayor of New York, 1 Barb., 168, in which the Court say at page 178, "that the record is conclusive evidence of the plaintiff's title and possession, as against the defendants therein named; but it has no force against anyone else, except that which the Legislature has given to it." The opinion then recites the statute in question, and declares that the action of ejectment is created by statute and is to have the effect which is declared by the statute, and no other, and that it concludes the parties to the action, and all parties claiming under them by title accruing after the commencement of the action. I think this disposes of the question of *res adjudicata*.

Can the bill by the complainant for the value of the improvements put upon this property, and of the taxes paid by Humphrey or by his consent be sustained?

The sixth allegation of the bill states, that "having recovered the final judgment aforesaid against the said Hurds and Smith, and the said Hurds and Smith, under the laws of the State of Michigan, being entitled to compensation for improvements made by them in good faith and under color of title, and in order to avoid further litigation in ascertaining and determining the value thereof, your orator entered into an agreement with said Hurds and Smith for the purchase of said improvements, and paid them therefor the costs of said improvements so made as aforesaid, and under said final judgment entered into possession, etc."

There are, I think, two insuperable obstacles to maintaining this bill for improvements and taxes. In the first place, I do not understand that the recovery of lands in an action of ejectment, or by a bill in equity in this form, can be conditioned upon the payment of improvements. As I understand it, the party is entitled to his land at all events, and the question of improvements can only be raised when he brings an action for mesne profits. In this connection, I quote from Tyler on Ejectments, page 848. In the action of trespass for mesne profits against a bona fide purchaser, he will be allowed against the plaintiff, in mitigation of damages, the value of the permanent improvements made in good faith, to the extent of the rents and profits claimed by the plaintiff. There is no reason in general why the owner of lands should be compelled to pay for improvements which he neither directed nor desired, as a condition upon which he is to gain possession of his property. But trespass for mesne profits is an equitable action, intended to do justice to the plaintiff by putting him in as good a situation as he would have held provided he had not been dispossessed. If waste has been committed, the damages may be increased accordingly beyond the measure of the rent to an extent which will make him whole. On the other hand, if improvements are made of a permanent and beneficial nature and the defendant entered in good faith, the value of such improvements should be deducted from the damages. In such a case it is very hard for the defendant to lose both land and improvements, and if the plaintiff is not content with acquiring possession of his property in an improved condition after he has neglected to assert his title for a considerable length of time, it is certainly equitable that the defendant should be allowed the value of his improvements made in good faith to the extent of the rents and profits claimed; and this is the view of the subject which is supported by the authorities.

So in the case of Jackson vs. Loomis, 4 Cowen, 168, 172, the Supreme Court of the State of New York observes: "There is no reason, in general, why the owner of land should be compelled to pay for improvements which he neither directed nor desired, as a condition on which he is to gain possession of his property." But where an occupant has taken possession under a bona fide purchase, and made permanent improvements, it is very hard for him to loose both land and

improvements. An interesting discussion of this question is contained in the case of Green vs. Biddle, 8 Wheaton, 1. In this case, an act of Kentucky relieving the occupants of land from paying damages for its wrongful detention before action brought, and requiring the lawful owner of the land to pay the occupant for his improvements, was held to impair the obligation of that part of the compact between Kentucky and Virginia, which declared that "all private rights and interests in land within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." It seems that soon after the separation of Kentucky from Virginia, certain laws were enacted upon this question of permanent improvements and mesne profits, and in commenting upon them, Mr. Justice Washington observes: "these laws differ from each other only in degree; in principle they are the same. They agree in depriving the rightful owner of the land, of the rents and profits received by the occupant up to a certain period, the first act fixing it to the time of actual notice of the adverse claim, and the latter act to the time of the judgment rendered against the occupant. They also agree in compelling the successful claimant to pay to a certain extent the assessed value of the improvements made on the land by the occupant." In commenting upon the common law, the learned Justice observes, page 75: "Nothing, in short, can be more clear upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant, or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the things recovered, and impairs his right to, and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure according to the extent of such restrictions." Again, page 80: "but even these doctrines of the civil law, so much more favorable to the rights of the true owners of the land than the act under consideration, was not recognized by the common

law of England. Whoever takes and holds possession of land to which another has a better title, whether by disseisen or under a grant from the deseissor, is liable to the true owner for the profits which he has received, of whatever nature they may be, and whether consumed by him or not." We are not aware of any common law case which recognizes a distinction between a bona fide possessor and one who holds mala fide in relation to the subject of rents and profits. We understand Lifford's case as fully proving that the right of the true owner to the mesne profits is equally valid against both. How far this distinction is noticed in a Court of Equity has already been shown.

Upon the whole, then, we take it to be perfectly clear that according to the common law, the Statute of Virginia, the principles of equity and even those of the civil law, the successful claimant of the land is entitled to an account of the mesne profits received by the occupant from some period prior to the judgment of eviction, or decree. Again, page 82: "taking it for granted that the rule as laid down in Coulter's case would be recognized as good law by the Court of Virginia, let us see in what respects it differs from the act of Kentucky. That rule is, that meliorations of the property, (which necessarily mean valuable and lasting improvements,) made at the expense of the occupant of the land, shall be set off against the legal claimant of the proprietor for profits which have accrued to the occupant during his possession. But, by the act, the occupant is entitled to the value of the improvements to whatever extent they may exceed that of the profits; not on the ground of set off against the profits, but as a substantive demand; for the account for improvements is carried down to the day of the judgment, although the occupant was, for a great part of the time, a mala fide possessor against whom no more can be offset, but the rents and profits accrued after suit brought. Thus it may happen that the occupant, who may have enriched himself to any amount by the natural, as well as the industrial products of the land, to which he had no legal title, (as by the sale of timber, coal, ore or the like) is accountable for no part of those profits but such as accrued after suit brought; and, on the other hand, may demand full remuneration for all the improvements made upon the land, although they were placed there by means of those very

profits, in violation of that maxim of equity, and of natural law, *nemo debet locupletari aliena jactura.*

The statute of this State proceeds upon the same hypothesis. I find no provision making the recovery of lands conditioned upon the payment of improvements, except in a few special cases; and in the provisions relating to mesne profits, from section 6,245 to section 6,256, the defendant is allowed the value of improvements put upon the land as an offset to the claim for rents and profits. On the trial—section 6,250—"plaintiff shall be required to establish, and the defendant may controvert, the time when such defendant entered into possession of the premises, the time during which he enjoyed the mesne profits thereof, and the value of such profits." And the defendants—section 6,251—"shall have the same right to set off permanent improvements made on the premises, to the amount of the plaintiff's claim, as is now allowed by law; and in estimating the plaintiff's damages, the value of the use by the defendant of any improvements made by him, or purchased by him in good faith from any person from whom he derives color of title thereto, shall not be allowed to the plaintiff." And the defendant is also allowed compensation for the value of the permanent improvements by section 6,252, when he claims title by virtue of a sale made by an executor, administrator or guardian, or the Auditor General or any County Treasurer, or other person authorized by the statute to make sale of land for non-payment of taxes. But I do not understand that the legislature intended to clog the right of the plaintiff in ordinary cases of ejectment from obtaining possession of his land by requiring him to pay for improvements; and consequently I understand that permanent improvements can only be claimed, even in an action for rents and profits, where the defendant has made them in good faith. Now, in this case there is some excuse for claiming that Hurds and Smith may have made these improvements in good faith, but the allegation of the bill is that these improvements were purchased by Humphrey, and clearly Humphrey was not acting in good faith. The decree of the Supreme Court adjudges that his conduct was fraudulent in procuring the deed of this property for his own benefit, and he is denied the character of a holder in good faith. So far as the question of good faith is concerned, it relates back to the time when the deed was taken.

I am entirely clear that Humphrey cannot be considered under this decree as having acted in good faith in making

or purchasing the improvements made by Hurds and Smith; and whatever their position in relation to this case, or to any claim for permanent improvements, the position of Humphrey is not entitled to consideration. While I have not had the opportunity for the extended examination of this case which its importance justifies, I have come to the conclusion that the demurrer is well founded and that the bill ought to be dismissed.

What I have said in regard to improvements applies also to taxes paid or purchased by the complainant Humphrey. If an action should be brought hereafter by Baker against him for rents and profits, the question of setoff for permanent improvements or for taxes may then be raised and disposed of, but I am clearly of the opinion that the execution of this decree ought not to be delayed by a bill of this kind. I therefore sustain the demurrer and dismiss the bill. It naturally follows from this that the motion for an attachment against Mr. Humphrey must be granted, and he is adjudged guilty of contempt; but inasmuch as he appears to have acted in good faith and upon the advice of counsel in declining to execute this deed, I am not disposed to impose a fine upon Mr. Humphrey, but will commit him to the House of Correction until the deed is executed and the costs of this proceeding are paid, together with an attorney fee of ten dollars.

A A Wells
For Appellee

Feb. 1881

Since writing the above opinion my attention has been called to the amendment of Sec. 6252 which had escaped my notice. Stats 1873. p. 473. Stats 1875 p. 207. They do not seem to affect the case (1) Because they are confined to actions of ejectment (2) Because Humphrey who held the color of title did not hold the same in good faith.

H B Brown
District Judge

# SUPREME COURT

OF THE

# UNITED STATES.

SANFORD BAKER,
vs.
GEO. P. HUMPHREY, ET AL.

No. 1069.

## Motion to Dismiss Appeal.

---

## BRIEF

OF JOHN ATKINSON,
Of Counsel for Appellant.

---

DETROIT:
H. F. Potter, 22 Bank Block.
1881.

# SUPREME COURT

OF THE

# UNITED STATES.

## Motion to Dismiss Appeal.

| | |
|---|---|
| SANFORD BAKER, Appellee, v. GEORGE P. HUMPHREY, HIRAM D. HURD, CHARLES A. HURD, and DAVID SMITH, Appellants. | 1069. |

To understand the merits of the appeal, which it is now moved to dismiss, it is necessary to review briefly this litigation between these parties. The case was before the Court and decided by it in May, 1880. (101, U. S., 494.) Humphrey purchased the lands in question from Bela Chapman, June 7, 1872, and commenced ejectment against Baker's vendees, Hurds and Smith, (June 10, 1872.) Baker filed his bill January 6, 1873, and an answer was filed March 27, 1873. Baker allowed his bill to sleep, without action, until September, 1874, when he obtained leave to take testimony, and brought his case to a hearing in April, 1876; when his bill

was dismissed. He appealed to this Court; and the decree was reversed, and Humphrey was ordered to convey, on payment of the purchase money, $25.00. While his appeal was pending, Mr. Baker assumed control of the ejectment suit pending in the State Courts, and defended it on the same grounds alleged in his bill, and a final judgment was entered in favor of Humphrey March 14, 1878. This judgment remains in full force. By the laws of Michigan, defendants in ejectment are entitled to be paid for improvements; and Mr. Humphrey agreed with Hurds and Smith upon the value of their improvements, and paid them, and entered into possession under his final judgment. After such entry, and pending said appeal, he had been compelled to pay large sums for taxes, in order to preserve the estate, and prevent tax titles accruing, which would cut off both parties.

After the decision of this Court, and before a decree was entered in the circuit, Mr. Humphrey obtained leave to file a bill of supplement and review, setting up these facts, and praying, in case his judgment in the State Courts was held subject to the decision in this Court, that he might be reimbursed for his improvements and taxes. This bill was demurred to, and the Circuit Court heard, at the same time, the demurrer, and a motion to punish Humphrey for not deeding under the decree. The demurrer was sustained, and the bill dismissed, and Humphrey was adjudged in contempt, and ordered to convey or stand committed. He appealed from the decree; and also from the order, which, if executed, would make his appeal from the decree valueless.

It will be seen that several very interesting questions are raised by the bill as filed by Humphrey viz:

*First.* The effect to be given by this Court to the judgment of the State Court rendered in the ejectment suit pending the appeal.

*Second.* Humphreys' right, in case that judgment be considered of no effect, to be reimbursed, for taxes paid while he held the title, which he is now decreed to have held for Baker.

*Third.* His right to recover for improvements made by

Baker's vendees, (Hurds and Smith,) of which he became the purchaser.

These are questions which properly arise in considering Humphrey's appeal from the decree dismissing his bill and sustaining the demurrer.

But if in the meantime the order for a conveyance is enforced, and the conveyance is broad enough to carry any interest which he may *now* have in the premises, then his appeal from the decree, even if successful, will be of no use to him.

The learned Judge who heard the case in the Circuit, heard the two matters together, as appears by his opinion, printed with Mr. Romeyn's argument on this motion. It is evident he would not have made this order if he had overruled the demurrer.

Having sustained the demurrer to the supplemental bill, the learned Judge seems to think that altho' his decree sustaining it has been appealed from, he may go on and execute the old decree. We, on the other hand, contend that the appeal from the decree dismissing the supplemental bill, brings with it to this Court the whole case. Should this Court grant the relief prayed in the supplemental bill, it will necessarily modify the old decree. But if in the mean time the old decree is executed, what will it avail the complainant?

The motion to dismiss is based on four grounds, viz:

I.

"That the order was made in pursuance of the mandate of this Court."

But we take it a decree made in pursuance of such mandate stands, as to matters not passed upon in it, exactly as if made by the Circuit Court on its own motion. It is no more sacred, in respect to a bill of review, presenting matters not therein adjudged, than any other decree. If such an order may be appealed from in any case, it may be appealed from in this. It is not, of course, sought to question the judgment

of this Court, but to submit important facts which have occurred since the appeal, which could not be considered with it, and which are claimed to affect the matter.

II.

"That the appeal from said order was and is frivolous, and without merits."

The question of merits will come up on the hearing, and cannot be determined on a motion to dismiss. If this were not so, every appeal which is eventually unsuccessful, might be disposed of on motion to dismiss. But this cannot surely be the practice.

III.

"That such appeal tends to delay and defeat the mandate and final decree of the Court."

It can certainly have no such effect. It merely secures a hearing upon the subject of taxes, improvements, and the effect of the judgment of the State Courts.

IV.

"That no appeal from such order could or should be entertained by this Court."

This raises the question whether the order is an appealable one.

Is it a final decree? That it disposes finally of the rights in question cannot be doubted, for Humphrey's deed, if given, conveys every right which he may have in the land, including rights under the state judgment, and the right to reimbursement for taxes and improvements.

This Court has never held its appellate powers to reach only what are technically called *final* decrees, but has treated

the statute as covering orders and decrees which *dispose* of important rights.

The order should really have been made a part of the decree dismissing the bill of supplement and review. The two taken together constitute a *final decree* in the cause. But the Circuit Court made them separately, and in that way compelled us to take two appeals instead of one; although in our judgment the appeal from the decree dismissing the supplemental bill brings up the whole case.

The bill is a part of the original suit, and not the com mencement of a new suit. The bill was filed as a bill of supplement and review, by leave of the Court. The order permitting the bill to be filed is not printed. It will be found in the original return to the appeal from the decree sustaining the demurrer. It is true, Humphrey's bill is against Baker alone, and he omits Hurds and Smith as parties. They were only nominal parties in the original suit, and before the supplemental bill was filed had ceased to have any interest in the premises. It was therefore unnecessary to make them parties.

Mitf. v. Tay., Eq. Pl. and Pr., 172, and following.

But the bill was nevertheless a part of the original suit, and must be disposed of before the original decree is executed.

The filing of the bill of supplement and review, and the appearance and demurrer thereto, for want of equity, stayed further proceedings in the original suit.

Mitf. v. Tay., Pl. and Pr., 172.

What office does a bill of supplement and review fill, if the original suit moves on regardless of it to final execution?

V.

The merits of the supplemental bill, as it seems to us, should not be disposed of on this motion. They will

come up in the regular way on the hearing. If this view is incorrect, then we submit that the decree below must be reversed.

1. The judgment of this Court fixed Humphrey's character as a Trustee for Baker; and in requiring Baker to pay him the original purchase money, recognized his right to be paid for his actual disbursements. If the fact had been before this Court that in addition to the $25 paid Chapman, Humphrey had paid $5000 taxes to preserve the property, is there any doubt that that sum would also be allowed. The fact is one occurring since the original appeal was taken, and comes now before the Court in the only possible way. This claim for taxes springs from the relation of *trustee* and *cestui qui trust*. A trustee is always entitled to his actual and necessary disbursements.

2. The claim for improvements arises under a statute of the State of Michigan. "Whenever, in any action of ejectment, the plaintiff, or any one or more of the plaintiffs, if there be more than one, shall recover, the defendant or defendants shall be allowed compensation for buildings and improvements on the premises recovered, erected or made, by him or them, or by any person through whom he or they claim title to the extent that such buildings or improvements shall increase the present value of said premises."

C. L. 1871, Sec. 6252. As amended, Sess. L. 1873, p. 473.

By an amendment in 1875, defendants must occupy under color of title, and in good faith.

S. L. 1875, p. 207.

The Court below overlooked this statute, as amended, and cites the statute as it stood before the amendment of 1873.

See Mr. Romeyn's Brief, p. 12.

Under this statute, Hurds and Smith had the absolute right to be paid for these improvements. Mr. Humphrey, in-

stead of compelling them to prove their value in Court, agreed upon the value and paid them for them.

The learned Judge, in the Circuit, seems to have had some doubts of the validity of the statute. The Supreme Court of the State has several times administered justice in obedience to it.

Rawson v. Parsons, 6 Mich., 401.
King v. Potter, 18 Mich., 134.
King v. Harrington, 18 Mich., 213.

Such statutes are enforced in many states, and have no where been declared void.

See Warner v. Fountain, 28 Wis., 405.
Davis v. Louk, 30 Wis., 308.
Walennan v. Dutton, 6 Wis., 265.
Thompson v. Thompson, 16 Wis., 91.
Parquette v. Perkins, 19 Wis., 219.

Since the appeal was taken, the Judge's attention has been called to the statute, and we learn that he has added his opinion that it is *immaterial.*

This opinion he bases upon Humphrey not being an *occupant under color of title and in good faith.* But Humphrey's claim for improvements is made as *purchaser* from Hurds and Smith, and there is no question as to their good faith.

Hurds and Smith were in under Baker, and made these improvements, relying upon his title. They sold to Humphrey, who now as to these improvements, stands in their shoes. As between them and Mr. Baker, he would have no right to these improvements. How can he have any as to Humphrey? The original case as presented is so changed by these supplemental facts, that the decree to do equity must protect Humphrey for any rights acquired by purchase, subsequent to the appeal. Especially should he be protected as to rights purchased from Baker, or those claiming under Baker. Suppose Baker had, pending the appeal, quit claimed

to Humphrey? Would this Court still enforce the decree in the original suit, and make Humphrey deed back to him?

Humphrey, as to these improvements, is the purchaser from Baker's vendees; and why his rights as *purchaser* should not be protected, statute or no statute, is hard to see.

3. As to the effect of the State judgment, the question is one of great importance. The State Court obtained jurisdiction of the controversy when the ejectment suit was commenced in 1872. It rendered its final judgment March 14, 1878. The bill in the U. S. Court was not filed until January 6, 1873, and the final judgment was not pronounced until May, 1880.

This Court has frequently decided that controversies commenced in the State Courts must be there determined. And on general principles, as well as in obedience to the statute, has refused to interfere.

Haines v. Carpenter, 1 Otto., 254.

But it may be claimed that a Court of law was incompetent to entertain the defense made by Mr. Baker. It did entertain and pass upon it, and decide it, under the opinion of the State Supreme Court.

Humphrey v. Hurd, 31 Mich., 436.

It passed upon the question as raised by Mr. Baker. He presented it. Can he now say that the Court which decided the merits was incompetent to do so, and should have rejected his defense on technical grounds?

When a case is submitted at law, although more properly a matter of equitable jurisdiction, the decision is respected in equity.

Spoon v. Baxter, 31 Mich., 279.
Wool v. Ruland, 10 Mo., 100.

And in Mays *et al* vs. Fulton, 11 B. R., 229, this Court held that a party could not submit a question to a State Court,

and when the decision went against him, say there was no jurisdiction to render it.

Mr. Baker takes the position now that the very Courts to which he submitted his case had no power to decide it.

The State Courts must judge for themselves as to the distribution of legal and equitable powers. They decided Mr. Baker's claims to be one that could be passed upon in an action of ejectment.

The learned Judge in the Circuit assumed that the judgment was not binding on Baker, notwithstanding his assumption of the defense, and disposed of it on that ground.

In this, we think he was in error. The statute of Michigan, C. L., 1871, Sec. 6207, provides: "If the premises for which the action, (Ejectment,) is brought, are actually occupied by any person, such actual occupant shall be named a defendant in the declaration."

When the Ejectment was brought, therefore, it was necessary to bring it against Hurds and Smith, who were the actual occupants. Under their contract with Baker, and his subsequent warranty deed, they called upon him to defend, and he assumed the defense. It was his title that was involved. He stood to them as lessor to lessee.

In Freeman on Judgments, 169, the rule is stated: "The landlord is not in general affected by any litigation against or in favor of his tenant in respect to the demised premises; *but if the issue is such as involves the lessors title, and he assumes the defense or the prosecution of the suit, the judgment operates upon his title as though he were a nominal party to the action.*"

In the case of State v. Orwig, 34 Iowa, 115, which was an action of ejectment, the opinion of the Court is, that, if the landlord is made a defendant, or is notified of the action, the judgment in ejectment against the tenant binds him.

The rule is thus laid down in Wharton's Ev., Sec. 766: A judgment against the casual ejector, in the old proceedings in ejectment, was admissible in any subsequent suit, involving virtually the same parties and interest.

A landlord is not concluded by judgment in ejectment

against his tenants, he not having notice of the suit, though the judgment is *prima facie* proof.

In Chirac v. Reinecker, 11 Wh., 280, where the landlord, in an action against him for mesne profits, was held bound by the judgment in a former suit against his tenant, Judge Story says, that if the notice to the landlord is in pais, and he is not called upon to defend, he would not be bound by the judgment, clearly intimating that if he has notice, and undertakes the defense, he will be bound.

In Chirac v. Reinecker, 2 Peters, 623, on a second hearing of the case, Judge Story, delivering the opinion of the Court, says that the judgment in an ejectment case against a tenant, is *prima facie* evidence of the plaintiff's title and possession, as against the landlord of that tenant, citing Chirac v. Reinecker, 11 Wh., 280, and 3 Camp., 355.

In Valentine v. Mahoney, 37 Cal., 395, the Court says: "From the moment the landlord interferes to defend, he controlls the proceedings; the tenant cannot further interfere with the proceedings to the landlords prejudice; the landlord is bound by them." * * * "Would it not be an anomaly in practice to permit a person to defend an action upon a particular issue, and immediately thereafter to litigate the same matter in another action with the same adversary, in total disregard of the judgment in the former action." Citing Wheelock v. Warshauer, 21 Cal., 309; Wheelock v. Warshauer, 34 Cal., 265. The Court says, further, that Ainslie v. Mayor of New York, 1 Barb., 169, one of the two cases relied upon by his Honor, the Circuit Judge applies only to cases where the landlord has not been able to defend in his own manner without being controlled by the tenant. The California code is the same in substance, if not in words, as the Michigan statute.

In Hanson v. Armstrong, 22 Ill., 443, in ejectment, it was contended that the plaintiff must make the landlord a party, because he was not in possession, and the Court holds that a judgment against one in possession, binds any other party, whose title is the same, and that therefore it was un-

necessary and improper to have more than one defendant, viz: the one in possession.

Peterson *et al* v. Lothrop *et al*, 34 Penn. Stat., 223, was an action of *scire facias* on judgment. The defense was a discharge under the bankrupt act. To meet this, the plaintiffs offered in evidence a judgment against the defendants, on that issue, in another cause, where defendants here were defendants with a third party, and plaintiffs' *cestui que trust* was plaintiff. The Court held the judgment admissible, saying in all cases it is proper to look beyond the nominal party, and treat as the real party him whose interests are involved in the issue, and who conducts or controls the action or defense, and hold him concluded by any judgment which may be rendered, and cites numerous authorities.

In Doe vs. Challes, 79 Eng. C. L., 168, an action for mesne profits, evidence was offered of a judgment in ejectment in a former suit, wherein another party was defendant, but where defendant here being interested as mortgagee interfered and assumed the defense. The judgment was held conclusive as against this defendant. Erle, J., remarks that defendant here had obtained the advantage of defending in the other suit; that he had delayed the plaintiff therein, and must stand by the position he took.

The cases cited by Judge Brown, are not opposed to the rule contended for. They hold only that where the landlord's title is not litigated he is not bound by the judgment.

If the landlord's title had been litigated by himself, uninfluenced by the tenant who was the nominal party, the New York Court would have decided as the others have. But in those cases the landlord's title had not been litigated. Here, Baker's title has been.

These suggestions are made upon the main question, the merits of the supplemental bill, although in my view, they cannot be disposed of on this motion.

JOHN ATKINSON,
Of Counsel for Appellant.